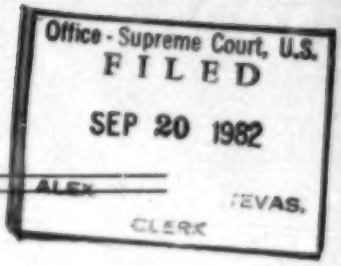
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NO. 81-



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LELAND LESTER SHAVER,
Petitioner,

V.

BOB L. HUNTER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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QUESTIONS PRESENTED

I. Whether, as the state appellate court held, the Equal Protection Clause and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), prohibit a state from establishing a public policy that "single family" restrictive covenants may not be enforced to prevent three biologically unrelated, handicapped women and their housemother from residing together in a "single family" dwelling?

II. Whether this Court may vacate the judgment of a state court which *sua sponte* has adjudicated a federal constitutional issue when no parties to the suit had standing to raise the issue and when, unlike in *Doremus v. Board of Education*, 342 U.S. 429 (1952), the petition to this Court presents a justiciable case or controversy?*

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* The parties to the proceedings below were Leland Lester Shaver, Bob L. Hunter, John Zakrasek, Osco Abney, D.D. Tibbets, and Myron Hart.

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No. 81-

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1981

LELAND LESTER SHAVER,
Petitioner,

v.

BOB L. HUNTER, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

Leland Lester Shaver petitions the Court for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Supreme Judicial District of Texas.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Supreme Judicial District of Texas, sitting at Amarillo, Texas, is reported at 626 S.W.2d 574 and reproduced as Appendix A to this petition. The judgment and findings of fact and conclusions of law, as amended, of the 140th District Court of Lubbock County, Texas, are unreported, but reproduced as Appendix C to this petition.

JURISDICTION

The judgment of the Texas court of appeals was entered on December 3, 1981, (Appendix B, 10a). On May 12, 1982, the Supreme Court of Texas refused, on the basis of no reversible error, an Application for Writ of Error (Appendix B, 11a), and on June 23, 1982, the same court overruled a Motion for Rehearing on Application for Writ of Error (Appendix B, 11a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution is the only constitutional or statutory provision involved in this case. In relevant part it states:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Virginia Place is a one block addition to the City of Lubbock, Texas. It was subdivided on December 1, 1948, and, at that time, certain restrictive covenants—quoted in pertinent part at Appendix C, 15a-16a—were imposed upon its subdivided lots. Currently, there are fifteen lots in the addition, all of which are used for residential purposes.

In April, 1980, thirty two years after the subdivision's creation, Mr. Shaver, the petitioner herein, purchased a house on a corner lot of the subdivision. After widening three of the interior doorways and installing "grab bars" in one of the bathrooms to accommodate persons using wheelchairs, he leased the house to a local charitable, non-profit organization which has as its goal the provision of jobs and independent living alternatives for severely handicapped persons in the area. This organization, in close cooperation with Mr. Shaver, then helped three severely handicapped women, along with their housemother, move into the house. Two of these women were mentally retarded, one had cerebral palsy and had to use a wheelchair, and one—the housemother—was not disabled. None was related to the others by blood, marriage, or adoption.

The women's living arrangement can be briefly described as follows. Taking into account their different disabling conditions, the household chores—cooking, cleaning, etc.—are shared, and much of their daily life—eating dinner, watching television, making week-end plans—is lived together. The length of the women's residence in the home is indeterminate.

Upon the women's moving in, five of the neighbors in the subdivision promptly sued Mr. Shaver, seeking an injunction to force the handicapped women out of his house on the grounds that their living arrangement violated the restrictive covenants and the city zoning ordinance. After a non-jury trial, the state district court granted the injunction, based on the restrictive covenants.[1] It held that the covenants permit only "single-family residential uses" and that the handicapped women's living arrangement was not such a use. By so holding, it implicitly rejected Mr. Shaver's state law contentions that the "single family" stricture covered structures, not uses, that the women's living arrangement constituted a single family, and that the covenants were unenforceable because they were against state and federal public policy encouraging the development of such living alternatives for handicapped people. Also implicitly rejected was Mr. Shaver's argument that court-ordered enforcement of the restrictive covenants against the residents of Mr. Shaver's house would violate the Equal Protection Clause of the Fourteenth Amendment.

The Amarillo appellate court, to which Mr. Shaver seeks to have this Court issue a writ of certiorari, affirmed the state trial court's judgment. It, too, failed to address Mr. Shaver's federal constitutional argument; however, it did raise *sua sponte* a new federal constitutional issue.

Using state common law principles applicable to restrictive covenant cases,[2] Mr. Shaver had argued that public policy, as expressed at both state and federal levels, in combination with the unreasonableness of the convenant's application in this case, made the covenant unenforceable. Instead of disposing of this issue on the posited state law grounds, however, the appellate court turned to federal constitutional law. Without articulating the level of scrutiny it was applying, the court simply held that acceptance of Mr. Shaver's public policy argument would create an unconstitutional preference for handicapped persons in violation of the

[1] The state trial court ruled against the neighbors on the zoning issue, and the appellate court did not address it. It will not be discussed further in this petition.

[2] *See, e.g., Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981).

Equal Protection Clause as explicated in Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 269–324 (1978). (App. A, 7a). When Mr. Shaver challenged the decision's rationale on this point in a motion for rehearing, the court refused to recede from its position – an unprecedented, far-reaching legal position it reached unbidden and without benefit of briefing or argument.

After the Supreme Court of Texas refused to hear the case, this petition ensued.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH CONTROLLING PRECEDENT FROM THIS COURT.

A. The decision below is in conflict with *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), is contrary to well-established principles of equal protection analysis, and egregiously misapplies *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

The first step in analyzing an issue arising under the Equal Protection Clause is to determine what classification scheme is established by a law or rule. In the instant case, were the state to have in force a public policy prohibiting the enforcement of "single family" restrictive covenants to exclude unrelated handicapped people from residing together in small numbers,[3] the class burdened by the rule would be all unrelated, non-handicapped persons who wished to reside together in small numbers. (For simplicity's sake, this class will be referred to as all unrelated, non-handicapped people.)

The second step in this equal protection analysis is to determine whether the class burdened by the rule constitutes a "suspect" class or not. *See Plyler v. Doe*, 102 S.Ct. 2382, 2394 n.14 (1982) (overview of what constitutes a suspect class). Nothing in this Court's cases discussing the indicia of suspectness even remotely suggests that unrelated, non-handicapped people constitute a suspect class. Indeed, in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) *(Belle Terre)*, the Court, by applying the rational basis test to a zoning

[3] It is important to note that the state law question on public policy never was resolved by the court below. In fact, none of the courts at the state level directly addressed the issue, and it remains unresolved.

classification scheme, implicitly held that unrelated persons who wish to reside together in small numbers do not constitute a suspect class. 416 U.S. at 8-9.

Belle Terre also supplies the next step in equal protection analysis when a suspect class is not involved:

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be "'reasonable, not arbitrary'" (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415) and bears "a rational relationship to a [permissible] state objective." *Reed v. Reed*, 404 U.S. 71, 76.

Belle Terre, 416 U.S. at 8. *See also Dandridge v. Williams*, 397 U.S. 471 (1970).

A state's objective in establishing a policy that "single family" restrictive covenants may not be enforced to prohibit small groups of handicapped persons from residing together would be to encourage the establishment of normalizing, more humane living arrangements for handicapped people. There can be no doubt that such an objective is a permissible one for a state.

The next and final question in this analysis then becomes whether the rule (or public policy) is rationally related to the state objective. Handicapped people often need to reside together in small groups, at least for a while, to achieve maximum independence. That these small group living arrangements involving people with strong emotional and psychological, if not biological, bonds can be more normalizing and humane when they occur in the midst of a "quiet place where yards are wide, people few, and motor vehicles restricted," *see Belle Terre*, 416 U.S. at 9, is a conclusion whose rationality is recognized by professionals in the human services area and by expert testimony at the trial of this case. In short, it makes perfect sense to help handicapped feel and act as other members of communities by helping them live where most of the community lives—in single family residential areas.

Given the analysis above, it is obvious that the Equal Protection Clause would not be violated by a public policy such as the one assumed by the court below. This result is not surprising. In the related area of zoning, differential treatment has long been constitutionally permissible if a suspect class or fundamental value is not involved in the zoning ordinance's classification scheme. *See, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (upholding differing treatment of historical and non-historical structures); *Euclid v. Ambler Realty Co.*, 272 U.S.

365 (1926) (upholding differing treatment of industrial and non-industrial uses). Differing treatment here, if such there be, is equally permissible.

The decision below's reliance on Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) *(Bakke)*, is, to say the least, puzzling. In *Bakke*, a racial classification was at issue, and such classifications are subjected to "the most rigid scrutiny." *Bakke, supra* at 291 (plurality opinion of Powell, J.). Here, as already explained, only minimal scrutiny is appropriate. The doubts expressed by Justice Powell about preference and relied upon by the lower court are in the context of *racial* preference, not preference in general. Establishment of a preference does not lead ineluctably to constitutional invalidation of the preference. In his *Bakke* opinion, Justice Powell himself observed that preferential weight can be given to a host of factors, including race. *Bakke, supra* at 315-21. In fact, since *Bakke*, the Court has upheld clear preferences, even in the racial area where the level of justification required is much higher than in this case. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). *Bakke* provides no support for the holding below, which is seriously misguided and fundamentally wrong.

Further elaboration is unnecessary. The federal constitutional decision before the Court for review is *clearly* wrong and wholly outside the boundaries of constitutional law. It is in direct conflict with principles established by this Court in many cases involving the Equal Protection Clause. The only real question, then, is not whether the decision is wrong, but whether the Court will take the case and declare it to be so. In addition to the reasons given below, it seems important that state courts, which increasingly are being called upon to decide federal constitutional issues, should have it made clear to them that they are not free to ignore this Court's decisions on those issues, as the court below did.

B. The court below adjudicated an important federal constitutional issue when the parties neither raised nor had standing to raise the federal constitutional issue, thereby undermining the principle of uniformity among the states on federal constitutional issues.

Ordinarily, a party must be a member of the class discriminated against in order to have standing to attack a rule for allegedly violating the Equal Protection Clause. *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 571, 576 (1915).

In the court below, neither the neighboring property owners nor Mr. Shaver raised the equal protection issue of whether the public policy rule sought by Mr. Shaver would violate the Equal Protection Clause. The court raised the issue on its own. It should not have done so. Even if he had wanted to do so, Mr. Shaver had no standing to raise the issue because he would have benefited from the rule instead of being injured. The neighbors likewise had no standing to raise the issue because they are not among the class that supposedly would be excluded by the rule—that is, the class composed of all unrelated, non-handicapped people desiring to reside together in small numbers. The neighbors, after all, already live in the subdivision.

Therefore, since no party had standing to raise the decisive constitutional issue, the court below in effect rendered an advisory opinion. This unnecessary and improper adjudication of a federal constitutional issue by a state court itself raises an important federal question that, if it is not remedied by this Court, will contribute to the deterioration of uniformity among state courts on the important issue of who may litigate federal constitutional issues. This uniformity among the states on the resolution of federal constitutional questions has been a principle steadfastly adhered to by this Court since the landmark decision in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

It is true that in *Doremus v. Board of Education*, 342 U.S. 429 (1952), this Court held that it would not review a state court decision adjudicating a federal constitutional issue, despite the fact that the decision really was advisory because no case or controversy was present. *Doremus* at 434. *But cf. Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 524-26 (1959) (rejecting state court holding on federal constitutional standing issue). However, there is a crucial difference between *Doremus* and this case. In *Doremus*, the party seeking review in this Court failed to present a case or controversy within the meaning of Article III of the Constitution. Here, on the other hand, the petitioner has presented an Article III case or controversy which he seeks to have the Court review.

Scholars have criticized the aspect of the *Doremus* decision concerning its refusal to review state court decisions on federal constitutional issues which carry with them federal justiciability questions. For example, Professor Paul Freund has disagreed with the decision because it undercuts nationwide uniformity on the issue of standing to raise a federal question—an issue he sees as a federal one. *See* P. Freund, *Supreme Court and Supreme Law* 35 (Cahn ed. 1954).

The reach of the *Doremus* decision has never been explained by the Court, and this case presents the Court with an opportunity to

delimit it to situations in which a case or controversy is not presented to the Court at the time review is sought. In doing so, the Court will promote uniformity among the states on an issue that in itself presents an important federal question—the standing of a party to raise a federal constitutional question.

II. THE DECISION BELOW IS IN CONFLICT WITH AND SUBJECTS TO CONSTITUTIONAL INVALIDATION THE DECISIONAL LAW OF THE HIGHEST COURTS OF AT LEAST ELEVEN STATES.

The highest courts of at least ten states—Colorado, Georgia, Iowa, Minnesota, Montana, New Jersey, New York, North Carolina, Rhode Island, and Wisconsin[4]—have held that living arrangements such as the one in Mr. Shaver's house constitute "single families" under either "single family" zoning ordinances or "single family" restrictive covenants. The highest court of one state—New Hampshire[5]—while rejecting Mr. Shaver's position on the definition of "single family," prohibited enforcement of a "single family" zoning ordinance on state public policy grounds. As far as research reveals, the same issue has been addressed at the intermediate appellate court level in four states—Connecticut, Louisiana, Michigan, and Pennsylvania—other than Texas. Uniformly, those courts have adopted Mr. Shaver's position on the "single family" question.[6] Finally, based on decisions in slightly different contexts, the highest courts of at least three other

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[4] *Hessling v. City of Broomfield*, 563 P.2d (Colo. 1977); *Douglas County Resources, Inc. v. Daniel*, 280 S.E.2d 734 (Ga. 1981); *Linn County v. City of Hiawatha*, 311 N.W.2d 95 (Iowa 1981); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn. 1981); *State ex rel. Region II Child and Family Serv., Inc. v. Dist. Court of the Eighth Judicial Dist.*, 609 P.2d 245 (Mont. 1980); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *Group House of Port Washington, Inc. v. Bd. of Zoning and Appeals*, 45 N.Y.2d 266, 380 N.E.2d 207 (1978); *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 274 S.E.2d 174 (N.C. 1981); *Mongony v. Bevilacqua*, 432 A.2d 661 (R.I. 1981).

[5] *Region 10 Client Management, Inc. v. Town of Hampstead*, 424 A.2d 207 (N.H. 1980) (group home for houseparents and eight developmentally disabled adults).

[6] *City of West Monroe v. Ouachita Ass'n for Retarded Children, Inc.*, 402 So.2d 259 (La.Ct.App. 1981); *Hopkins v. Zoning Bd. of Abington Township*, 423 A.2d 1082 (Pa.Commw.Ct. 1980); *Malcolm v. Shamie*, 95 Mich.App.132, 290 N.W.2d 101 (1980); *Oliver v. Zoning Comm'n of the Town of Chester*, 31 Conn.Sup. 197, 326 A.2d 841 (1974).

states—Illinois, Kentucky, and Ohio[7]—are likely, when directly presented with the issue, to adopt Mr. Shaver's position.

Each of these states' decisions was premised on state, not federal law. Additionally, each of the fifteen state decisions that dealt directly with living arrangements for handicapped people was permeated with considerations of state public policy favoring the establishment of group homes, although only the New Hampshire Supreme Court's decision in *Region 10* rested solely on the public policy argument.

The relevance of all these cases to the issue presented by this petition is that all of them now are subject to constitutional attack and invalidation based on the constitutional rule of law established by the Amarillo appellate court below.

While it may be safe to predict that state and federal courts that might be presented with litigation raising this issue will reject the court below's holding, it also is safe to predict that such litigation, with its attendant delay, expense, and burdening of crowded court dockets, will arise now that the premise for it has been given some respectability by the Amarillo court. Legal contests that heretofore had been confined nearly exclusively to state law issues would become federal cases and what formerly had been state law questions would become constitutionalized.

Perhaps the most important reason for granting the writ is that the decisional law of at least eleven and perhaps as many as eighteen states has been placed, suddenly and unexpectedly, under a constitutional cloud. Swift action by the Court in this case can remove that Cloud, without the Court's having to address the validity of a single state law, policy, or practice or the special functions of any coordinate or co-equal branch of government. Instead, the Court's performance of its role as final arbiter of the Constitution, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), would, if the ruling were favorable to Mr. Shaver, leave the states (and the federal government) freer to develop laws and policies addressing the problems and needs of the nation's handicapped citizens than they are under the legal principle established, but not examined, but the court below.

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[7] *City of Des Plaines v. Trottner*, 34 Ill.2d 432, 216 N.E.2d 116 (1966); *Robertson v. Western Baptist Hospital*, 267 S.W.2d 395 (Ky. 1954); *Saunders v. Clark County Zoning Dep't*, 66 Ohio St.2d 259, 421 N.E.2d 152 (1981) (reversing, in a non-disabled context, the prior position in *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St.2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981)).

III. THE LEGAL PRINCIPLE ESTABLISHED BY THE COURT BELOW INTERFERES WITH AND SUBJECTS TO CONSTITUTIONAL INVALIDATION HERETOFORE UNQUESTIONABLY IMPORTANT AND PERMISSIBLE STATE AND FEDERAL PUBLIC POLICY INITIATIVES.

A. The constitutional holding of the decision below would invalidate numerous state and federal statutes.

Because the court below's decision is virtually barren of analysis and explanation, the petitioner cannot canvass fully all the statutory enactments that, under the decision's holding, would be unconstitutional as a violation of the Equal Protection Clause.

At the federal level, Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793(a), would be unconstitutional. It explicitly requires certain federal contractors to establish affirmative action programs for handicapped people. *But compare Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding constitutionality of racial preference for federal grantees). Section 501 of the same act, 29 U.S.C. § 791(b), which requires affirmative action for handicapped federal employees, also would be unconstitutional.

At the state level in Texas, examples of statutory provisions arguably subject to invalidation because they create a "preference" for handicapped people include §§ 11.13(d) (partial property tax exemption for disabled person's homestead), 11.22 (property tax exemption for disabled veterans), and 152.086 (property tax exemption on motor vehicles modified for orthopedically handicapped persons) of the Texas Tax Code and §§ 121.003(b) (prohibiting common carriers from charging fares for handicapped persons' guide dogs, wheelchairs, etc.) and 121.003(c) (prohibiting public facilities from excluding handicapped persons using crutches, guide dogs, etc.) of the Texas Human Resources Code.

Again, as with the numerous state court decisions discussed earlier, the petitioner is not suggesting that other courts would follow the court below's holding and actually hold any of the cited statutes unconstitutional.[9] Instead, the petitioner has referred to these statutes to show the potential disruptiveness of the state

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[9] Indeed, this conlusion—that the decision of the court below on the equal protection issue is so clearly contrary to this Court's precedents—is the very basis for asking the Court to grant the petition in the first instance.

appellate court's seriously misguided holding insofar as it affects all statutory attempts to deal with issues of special importance to handicapped people.

B. The constitutional holding of the decision below would seriously impede widespread efforts to establish community living alternatives for handicapped people.

This Court recently has recognized that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081, "established a national policy to provide better care and treatment" to developmentally disabled citizens. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 31 (1981). One aspect of that better care and treatment is that such citizens should receive habilitation in a setting that is least restrictive of their personal liberty. *See* 42 U.S.C. § 6010(2). These policies, of course, both arose from and helped foster the nationwide trend toward deinstitutionalization of handicapped persons, primarily those who are mentally retarded.

One of the principal manifestations of that trend has been widespread attempts to establish community living alternatives for handicapped people. *See generally* Developmental Disabilities State Legislative Project of the ABA Commission on the Mentally Disabled, *Zoning for Community Homes Serving Disabled Persons* 1 (1974), *reprinted in* 2 Mental Disability L. Rep. 794 (1978). The recent vintage of most of the state court decisions already discussed is undoubtedly an outgrowth of these widespread efforts.

The decision below can only help squelch these efforts to implement well-established public policy. Its ill-considered legal principle would foreclose many of these efforts for handicapped citizens across the nation.[9] It is important for this Court to let the entities implementing these policies know if their efforts are—as they never before would have imagined them to be—unconstitutional or if, instead, they are permissible, although not necessarily required, methods for addressing the recognized needs of handicapped citizens.

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[9] The disruptiveness of the court's holding and its importance to the three severely handicapped women who may be forced to move out of Mr. Shaver's house is readily apparent.

CONCLUSION

For these reasons, the petitioner prays that the petition for a writ of certiorari be granted and that the judgment of the Court of Appeals for the Seventh Supreme Judicial District of Texas be vacated.

Respectfully submitted,

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APPENDIX A

LELAND LESTER SHAVER,
Appellant,

v.

BOB L. HUNTER, et al.,
Appellees.

No. 9320

Court of Appeals of Texas,
Amarillo.

Dec. 3, 1981.

Rehearing Denied Dec. 28, 1981.

Before REYNOLDS, C.J., and DODSON and COUNTISS, JJ.

DODSON, Justice.

As plaintiffs, Bob L. Hunter, John Zakrasek, Osco Abney, D.D. Tibbets and Myron Hart brought this action seeking, among other things, to enjoin Leland Lester Shaver, the defendant, from violating the "single family residency" use requirements of a restrictive covenant imposed on Virginia Place Addition, a Lubbock subdivision. The plaintiffs are homeowners in the subdivision. The defendant owns a corner lot and approximately one half of another adjacent lot in the subdivision. A single family residence is situated on the corner lot.

The defendant leases all of his property to the Lubbock Area Extended Rehabilitation Services, a non-profit corporation. In conjunction with the Texas Rehabilitation Commission, the corporation uses the property to provide sheltered living arrangements for severely handicapped persons. At the time of trial, the residence was occupied by a health care provider employed and paid by the commission and three handicapped clients of the corporation. The occupants are unrelated single young women. The three clients pay rent to the corporation, which in turn pays the rent to the defendant.

The covenant which plaintiffs sought to enjoin defendant from violating primarily restricted all lots of Virginia Place to use for

residential purposes only, specifying that a residence shall be construed to be a single family dwelling. Concluding that the use of the property did not comply with the single family residency requirements, the trial court enjoined the defendant from violating the restrictive covenant. The defendant appeals from the judgment and we affirm.

The defendant presents three points of error. With his first point, the defendant maintains that the use of the property in question complied with the restrictive covenant because "the house is a single family dwelling being used for residential purposes and the covenant does not reach beyond this prohibition." In effect, the defendant contends that the restrictive covenant limits only the construction of dwellings and not their use and occupancy.

We acknowledge that when the covenant restricts the form or character of the structure rather than limiting the use of the property to a single family residence, some courts refuse to enjoin group home living arrangements where the group functions as a single household unit. *See J.T. Hobby & Son, Inc, v. Family Homes Etc.*, 274 S.E.2d 174 (N.C.1981), (a married couple as resident managers and four mentally handicapped adults); *Malcolm v. Shamie*, 290 N.W.2d 101 (Mich.App.1980), (foster parent and five mentally handicapped women, with the court limiting its decision to "the same or very similar factual situations"); *Bellarmine Hills Ass'n v. Residential Systems Co.*, 84 Mich.App. 554, 269 N.W.2d 673 (1978), (a foster parent and fewer than six mentally handicapped children, where the children temporarily resided on the property in order to attend special classes).

Our analysis of similar cases further reveals that when the restrictive covenant limits the use of a piece of property to one single family residence rather than merely prescribing the form or character of the structure that can be built on that property the courts enjoin the group home living arrangement, commercial activity, and any living arrangement other than that of a single family residence. *See Jayno Heights Landowners Ass'n v. Preston*, 85 Mich.App. 443, 271 N.W.2d 268 (1978), (group home for elderly women); *Cash v. Catholic Diocese of Kansas City—St. Joseph*, 414 S.W.2d 346 (Mo.App.1967), (Mother Superior and eight to ten nuns); *Seaton v. Clifford*, 100 Cal.Rptr. 779, 24 Cal.App.3d 46 (1972), (home-owner and six or fewer mentally handicapped persons); *Davis v. Hinton*, 374 S.W.2d 723, 726 (Tex.Civ.App—Tyler 1964, writ ref'd n. r. e.), (premises occupied by business tenants and a lodger).

In support of his position, and relying on *MacDonald v. Painter*, 441 S.W.2d 179, 183 (Tex.1969), and *Southhampton Civic Club v. Couch*, 159 Tex.464, 322 S.W.2d 516, 518 (1958), the defen-

dant asserts that "restrictions are construed strictly in favor of the grantee and against the grantor and in favor of the free and unrestricted use of the property." In *Southampton*, the rule is properly stated "that in construing covenants restricting the use of land all *doubt* should, as a general rule, be resolved in favor of the freer use of property and against restrictions." (Emphasis added). *Id.* However, the general principle stated in *Southampton* should not be applied in such a way as to defeat the clear intent and the plain and unambiguous purpose expressed in the restriction. *See Stephenson v. Perlitz*, 532 S.W.2d 954, 956 (Tex.1976); and *Knopf v. Standard Fixtures Co., Inc.*, 581 S.W.2d 504 (Tex.Civ.App.—Dallas 1979, no writ).

The covenant in question provides that all lots shall be used for residential purposes only and states that a "residence shall be construed to be a single family dwelling." The clear intent and the plain and unambiguous purpose expressed in the covenant is to restrict the use of the property to a single family residence. In *Davis v. Hinton*, 374 S.W.2d 723 (Tex.Civ.App.—Tyler 1964, writ ref'd n. r. e.), the court construed a restrictive covenant identical in effect to the covenant before us. In *Davis*, the appellant made the same challenge that the defendant asserts here. In disposing of the appellant's challenge, the court determined that the covenant limited the use of the property to a single family residence rather than merely prescribing the form or character of the structures that could be built on the property.

The court's determination in *Davis* was predicated on the general rule that as employed in building restrictions the words "dwelling house" are, in the absence of anything to the contrary, construed in their ordinary sense as a house occupied as a residence rather than as a store, office or other building; and that the term defines the *use* of the property rather than merely the form or character of the structure. *Id.* at 726. In the present case we conclude that the clear intent and the plain and unambiguous purpose expressed in the restrictive covenant in question is to limit the use of the property to a single family residence rather than merely to prescribe the form or character of the structure. The defendant's first point is overruled.

In his second point of error, the defendant maintains that the trial court erroneously failed to conclude that the people occupying the property constitute a single family and, therefore, their use of the property is permissible under the restrictive covenant. In essence, he contends that the four unrelated single women constitute a single housekeeping unit and that the housekeeping unit constitutes a single family within the covenant's meaning. We disagree.

When construing restrictive covenants which limit the use of property to "single family residence," the courts generally construe the term to mean a "nuclear family" or an "extended family." The "nuclear family" consists of only "parents, children and domestic servants." *See Rudy v. Southampton Civic Club*, 271 S.W.2d 431, 435 (Tex.Civ.App.—Waco 1954, writ ref'd n. r. e.). Generally, the "extended family" consists of a nucleus group of persons related by blood, marriage or adoption which may include parents, children, uncles, aunts, nieces and the like. This family group is often extended to include the family's domestic servants and incidental boarders and lodgers. Annot., 71 A.L.R.3d 693, 699 (1976). *Cf. Southampton Civic Club v. Couch*, 159 Tex. 464, 322 S.W.2d at 518.

The defendant primarily relies on the *City of White Plains v. Ferraioli*, 357 N.Y.S.2d 449, 34 N.Y.2d 300, 313 N.E.2d 756 (1974), to support his position that the young women's living arrangement constitutes a single family residence within the meaning of the restrictive covenant. In *Ferraioli*, the court construed a city zoning ordinance. The Ferraioli house was located in an R-2 zone of the city where the principal permitted uses were "a 'Single family dwelling for one housekeeping unit only,' fire houses, police stations, public schools and churches." In the zoning ordinance, "family" was defined as "one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers or sisters of the owner or the tenant or of the owner's spouse or tenant's spouse living together as a single house-keeping unit with kitchen facilities." We observe that this definition basically follows the "extended family" view.

The Ferraiolis leased their house to Abbott House, Inc., a private agency licensed by the state of New York to care for neglected and abandoned children. The occupants of the house consisted of an adult couple, their two children and ten foster children. The adult couple was paid a salary to care for the foster children and all of the household expenses were paid by Abbott House with funds received from the city of New York. The court stated that the living arrangement was permanent and *"akin to a traditional family* which also may be sundered by death, divorce, or emancipation of the young. Neither the foster parents nor the children are to be shifted about; the intention is that they remain and develop ties in the community. *The purpose is to emulate the traditional family and not to introduce a different 'life style'."* (Emphasis added). The court distinguished this living arrangement from a temporary one such as a group of college students sharing a house and commuting to a nearby school, or a "so-called 'commune' style of living." The court determined, as a matter of law,

that the group in question constituted a family for the purposes of the zoning ordinance.

As we analyze *Ferraioli*, the court by judicial fiat (1) amended the zoning ordinance's definition of "family" by adding "foster children"; (2) extended the "extended family" view to include foster children; and (3) in effect, advanced an "alternative" or "emulated" family view. In the present case, *Ferraioli* is neither controlling nor persuasive. Here, the construction of the restrictive covenant is controlled by the definition of family set out in *Southampton Civic Club v. Couch*, 159 Tex. 464, 322, S.W.2d at 518.

In *Southampton*, the court construed a restrictive covenant which limited the use of the property to a single family residence purposes. Seven suits were filed and consolidated for trial. The relief sought in each case was to restrain the defendant-owner from renting a room or rooms in his residence for lodging. Most of the lodgers were students at Rice Institute. The trial court concluded that the renting of rooms to the students violated the restrictive covenant, but submitted to the jury the defendant's waiver issues. The jury found no waiver. The trial court rendered judgment enjoining the owners from violating the restrictive covenant. The Court of Civil Appeals, 313 S.W.2d 360, 365, reversed the trial court's judgment, dissolved the injunction and rendered judgment for the defendant-owners.

In the Supreme Court, the petitioners relied on the "nuclear family" definition in *Rudy v. Southampton Civic Club*, 271 S.W.2d at 435. The Supreme Court disapproved of that definition *(i.e.*, "parents, children, and domestic servants") as being "entirely too restrictive" because "it would exclude a dependent mother or an invalid brother or sister." 322 S.W.2d at 518, 159 Tex. 464. In further disposing of the petitioner's position, the court stated that the generally accepted definition of the word "family" is "a household, including parents, children and servants, and, as the case may be, lodgers or boarders." *Id.* The court determined that the restrictive covenant was not violated by a family incidentally renting a spare room in its single family residence. In effect, the court rejected the limited "nuclear family" view and adopted the less restrictive "extended family" view. The Supreme Court affirmed that part of the Court of Civil Appeals' judgment which reversed the trial court's judgment and dissolved its injunction, and remanded the action for a determination of whether the homeowners were operating commercial boarding houses.

In this instance, the occupants of the property in question do not constitute a family under the *Southampton* definition. We have not been directed to, nor have we found, a Texas case decided

since *Southampton* which even suggests or intimates that the definition should be extended to include four unrelated single adults. Accordingly, we overrule the defendant's second point of error.

In his third point of error, the defendant maintains that the restrictive covenant in question is unreasonable and against public policy and, therefore, is unenforceable in this case. In effect, the defendant contends that for public policy considerations, his use of the property is entitled to preferred treatment because the property is used to provide a sheltered living arrangement for three mentally or physically handicapped persons. We disagree.

In support of his position, the defendant cites general policy statements from federal and state legislation.* In each instance, among other things, the legislation was enacted to encourage the de-institutionalization of handicapped persons. Viewed broadly, the legislation in each instance was also enacted to encourage and to assure equal protection of the law to the handicapped person. Otherwise, the legislation would be subject to unnecessary constitutional scrutiny under the due process of law clause of the 5th and 14th Amendments and the equal protection clause of the 14th Amendment of the United States Constitution.

The State's action in enforcing a restrictive covenant is subject to constitutional scrutiny under the 14th Amendment's equal protection clause. *See Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1947). For us to follow the defendant's contention, we would have to say to the property-owner plaintiffs, "You can enforce the restrictive covenant against all non-single family residence uses except such living arrangements which include handicapped persons." That type of selective enforcement and preferred treatment to the handicapped would not pass constitutional muster. *See University of California Regents v. Bakke*, 438 U.S. 265, 293–98, 98 S.Ct. 2733, 2749–50, 57 L.Ed.2d 750 (1978), particularly that portion of Mr. Justice Powell's opinion when, speaking for the majority of this landmark reverse discrimination case, he addresses the "serious problems of justice connected with the idea of preference itself." *Id.* at 298, 98 S.Ct. at 2750. We overrule the defendant's third point of error.

In their first amended petition, the plaintiffs sought injunctive relief against the defendant under the zoning ordinances of the City of Lubbock. The trial court determined that the plaintiffs did not have standing to enforce the City's zoning ordinances. By cross-point, the plaintiffs challenge the trial court's determination. In view of our disposition of the defendant's three points of error,

* 42 U.S.C. 6010 (2) (The Developmentally Disabled Assistance and Bill of Rights Act), and sections 2(a), (b) & (c), and 7, Article 5547-300 (Mentally Retarded Persons Act of 1977).

we deem it unnecessary to consider the plaintiffs' cross-point.

The judgment is affirmed.

COUNTISS, Justice, concurring.

I concur in the opinion of the court. It correctly analyzes and resolves the points of error under existing Texas law. If, however, the definition of "family" as used in a restrictive covenant were an open question, I would reverse this case under the second point of error.

We are obligated to follow the definition of "family" that is stated in *Southampton Civic Club v. Couch*, 159 Tex. 464, 322 S.W.2d 516 (1958). Although that definition is imprecise at best, it clearly does not encompass the living arrangement in question here. The definition is, however, unrealistic and unduly restrictive. Certainly a family structured in the traditional sense is a desirable societal arrangement that promotes stability and imparts sound values, but I think it is wrong to conclude that it is the only societal arrangement entitled to be recognized as a family. The reasons for a broader definition are adequately stated in *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 843, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14 (1977); *Crowley v. Knapp*, 94 Wis.2d 421, 288 N.W.2d 815 (Wis. 1980); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *City of White Plains v. Ferraioli*, 357 N.Y.S.2d 449, 34 N.Y.2d 300, 313 N.E.2d 756 (1974); and Developments—The Family, 93 Harv.L.R. 1156, 1218, 1270—83 (1980), and need not be repeated here.

Consistent with the foregoing authorities, I would prefer to define "family" as a stable housekeeping unit of two or more persons who are emotionally attached to each other and share a relationship that emulates traditional family values, promotes mutual protection, support, happiness, physical well-being and intellectual growth and is not in violation of the penal laws. Under that definition, the housemother and her three charges in this case would be permitted to remain in the dwelling in question.

The appellees in this case are justifiably concerned about maintenance of the integrity of their neighborhood. It seems to me, however, that the neighborhood is in no more danger from the definition I suggest than from the *Southampton Civic Club* definition, under which one or more parents, an unlimited number of children, servants and collateral kin and an undetermined number of lodgers or boarders could reside in a single dwelling.

For the foregoing reasons I concur in the opinion of the court, but would reach a different result if we were not obligated to follow the *Southampton Civic Club* case.

APPENDIX B

B-1

LELAND LESTER SHAVER	*	FROM THE 140TH DISTRICT COURT OF LUBBOCK COUNTY
NO. 9320 V.	*	
BOB L. HUNTER, ET AL	*	DECEMBER 3, 1981
	*	OPINION BY ASSOCIATE JUSTICE DODSON: CONCURRING OPINION BY ASSOCIATE JUSTICE COUNTISS

This cause came on to be heard on the transcript of the record and the same being inspected and it appearing to the Court that there was no error in the judgment, it is therefore ordered, adjudged and decreed that the judgment of the trial court be in all things affirmed.

It is further ordered that appellees, Bob L. Hunter, John Zakrasek, Osco Abney, D.D. Tibbets and Myron Hart, do have and recover of and from the appellant, Leland Lester Shaver, the amount adjudged below together with all costs in this behalf expended for which let execution issue.

It is further ordered that this decision be certified below for observance.

CLERK'S OFFICE-SUPREME COURT

Austin, Texas May 12, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of NO. C-1030, LELAND LESTER SHAVER

vs.

BOB L. HUNTER ET AL.

was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

THE SUPREME COURT OF TEXAS
June 23, 1982

Ms. Renea Hicks, Attorney
5555 North Lamar - Suite K-109
Austin, Texas 78751

Mr. Donald M. Hunt, Attorney
P.O. Box 2585
Lubbock, Texas 79408

Dear Attorneys:

You are hereby notified that the motion for rehearing in the case of SHAVER v. HUNTER ET AL., No. C-1030 was this day overruled.

Very truly yours,

/s/

Garson R. Jackson, Clerk

APPENDIX C

NO. 98,568

BOB L. HUNTER, ET AL	*	IN THE 140TH DISTRICT COURT
VS.	*	OF
LELAND LESTER SHAVER	*	LUBBOCK COUNTY, TEXAS

JUDGMENT

On the 9th day of June, 1980 came on to be heard the above entitled and numbered cause and came the Plaintiffs in person and by their attorney of record and came the Defendant in person and by his attorney of record and announced ready for trial. The Court proceeded to hear the evidence, oral and documentary, after the close of which the Court requested, and the parties submitted, briefs in support of respective positions. All issues of fact and of law in the above entitled case have now been determined by the Court, and it appears to the Court, and the Court finds, that the Defendant is the owner of all of Lot Seven (7) and the West fifty feet (50') of Lot Six (6) in Virginia Place, an Addition to the City of Lubbock, Lubbock County, Texas, and a subdivision of the North One-Half (N/2) of Block Eight (8) of the Lubbock View Addition to the City of Lubbock in Lubbock County, Texas, that there are restrictive covenants applicable to the aforesaid lots and all other lots in said Virginia Place which restrict said lots and structures thereon to use for single-family residential purposes only, that the use being made by the Defendant of the property is not a single-family residential use and is in violation of the aforesaid restrictive covenants, and that the Plaintiffs are entitled to an injunction permanently enjoining the Defendant from continuing his violation of such restrictive covenants;

IT IS, THEREFORE, hereby ORDERED, ADJUDGED AND DECREED that the Defendant be, and he is hereby, permanently and perpetually enjoined from, and that he shall desist from, using or permitting anyone else to use his aforesaid property for any use other than single-family residential purposes and that Defendant is permanently and perpetually enjoined from continuing his violation of, or permitting any tenant of his to continue the violation of, the restrictive covenant of record in Volume 381, Page 51, et seq of the Deed Records of Lubbock County, Texas, which restricts the use of the aforesaid property owned by the Defendant for any purpose other than single-family residential purposes.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs do not have standing as private individuals to maintain a suit to enjoin the alleged violation by the Defendant of the City of Lubbock Comprehensive Zoning Ordinance, 1975.

All other relief herein sought by either party is hereby expressly denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs do have and recover from the Defendant, LELAND LESTER SHAVER, all costs in this behalf expended, for all of which let writs of injunction and execution issue.

SIGNED this the 2d day of October, 1980.

/s/ William R. Shaver

Judge, 140th District Court,
Lubbock County, Texas

BOB L. HUNTER ET AL No. 98,568

v.

LELAND LESTER SHAVER

In the 140th District Court

of Lubbock County, Texas

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to a request by the Defendant, the Court, within the time permitted by law, makes and files the following as its Findings of Fact and Conclusions of Law:

Findings of Fact

1. On or about December 1, 1948 Vincent Carr and his wife, Ruth Carr, platted and dedicated a tract of land known as Virginia Place, more specifically described as "Virginia Place, an Addition to the City of Lubbock in Lubbock County, Texas and a subdivision of the North One-Half of Block Eight (8) of the Lubbock View Addition to the City of Lubbock in Lubbock County, Texas."

2. The Dedication Deed and the Plat of Virginia Place were filed for record in the office of the County Clerk of Lubbock County, Texas on December 18, 1948 at 11:55 o'clock p.m. and are recorded in Vol. 381, Page 51, of the Deed Records of Lubbock County, Texas.

3. In such Dedication Deed, Vincent Carr and wife, Ruth Carr, imposed protective covenants running with the land for a period of thirty-five years (35) years from December 1, 1948 and thereafter for successive periods of ten (10) years each unless eliminated or modified in whole or in part by a majority vote of those persons owning lots or premises in said subdivision.

4. The Dedication Deed contains the following, among other, language:

> "1. All lots in VIRGINIA PLACE shall be used for residential purposes by white persons only; ...
>
> 2. A residence shall be construed to be a single family dwelling not to exceed two stories in height, together with the out buildings or structures appurtenant to a private dwelling; and no structures shall be erected,

altered, placed or permitted to remain on any of said tracts of land except one family dwellings, together with garage or garages and necessary servants' quarters. The garage or servants [sic] quarters may include a laundry room or laundry facilities to be used for the convenience of the occupants of the dwelling and not as a public laundry; and except as herein set out, no other buildings may be erected on such plot or premises except childrens' [sic] playhouses or buildings of like nature used for the convenience or pleasure of the occupants of the dwelling.

. . . .

4. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may become an annoyance or a nuisance to the neighborhood. No horses, cows, hogs, sheep or other livestock or polutry [sic] shall be kept for any time or any purpose on any of the lots in this subdivision."

5. Said Dedication Deed also contains the following provision: "If the parties hereto, any of them, their heirs or assigns, shall violate or attempt to violate any of the covenants herein, it shall be lawful for any other person or persons owning any real property situated in VIRGINIA PLACE to prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate such covenant, and either to enjoin them from doing so or to recover damages for such violation. The rights of action here given are several and cumulative to all owners."

6. Each of the Plaintiffs herein own property, on which their homes are located, in Virginia Place.

7. Defendant is the owner of all of Lot Seven (7) and the West fifty feet (50') of Lot Six (6) in said Virginia Place.

8. Defendant acquired his property from Virginia Gayle Perry, individually and as Independent Executrix of the Estate of O.B. Perry, Deceased.

9. The house located on the property owned by the Defendant was occupied by Mrs. Perry, and, before his death, by Mrs. Perry and her husband, as their home, prior to its acquisition by Mr. Shaver.

10. Defendant SHAVER has leased the property owned by him in said Virginia Place to a non-profit corporation, Lubbock Area Extended Rehabilitation Services (LAERS) for the housing and

care of persons mentally handicapped or retarded or physically handicapped.

11. Prior to the time Defendant acquired his property and prior to the time Defendant leased the property to LAERS, both the Defendant and LAERS were aware of the restrictive covenants applicable to the property and of the Plaintiffs' intentions to enforce such covenants.

12. The Defendant leased the property to LAERS and moved some furniture into the house prior to recording his deed to the property.

13. Under the lease from the defendant, the house owned by the defendant was at the time of trial occupied by four (4) adult persons, none of whom are related, and one of whom was acting as a "home care provider" for the other three (3) who are handicapped persons. These persons, other than the home care provider, were persons approved by and receiving aid from the Texas Rehabilitation Commission.

14. It is the intention of LAERS to ultimately place in said home no more than six (6) such persons, plus a single person or a married couple as a home care provider or providers. LAERS does not expect that any of these persons will be related by blood, adoption or marriage, other than the married couple who might serve as "home care providers."

15. If permitted to continue the use of the property belonging to the Defendant, LAERS will continue to use the house for the housing of persons eligible for assistance from LAERS and the Texas Rehabilitation Commission.

16. The living standards of the Texas Rehabilitation Commission, from whom LAERS receives its primary funds, would permit the housing of more persons in said house than the six (6) individuals plus a home care provider or home care providers now intended.

17. The occupants of the house under the lease with LAERS are free to move from the house at their discretion, without any type of family control.

18. The occupants of the house owned by the Defendant each individually pay rent to LAERS and then LAERS pays rent to the Defendant.

19. LAERS is paid a substantial sum each month by the Texas Rehabilitation Commission for providing care for the occupants of the Defendant's house.

20. All other dwellings in Virginia Place are occupied by families consisting of persons related either through blood or marriage.

21. At the time the restrictive covenants were imposed by Vincent Carr and wife, Ruth Carr, it was their intention that the words "single family" as used in such restrictions be interpreted in accordance with the commonly accepted meaning of such words as such meaning existed in the year 1948, the date of such Dedication Deed, which the Court finds to be one or more persons related by blood, adoption or marriage.

22. Section 2.45 of the City of Lubbock Comprehensive Zoning Ordinance, 1975, defines a family as "one or more persons related by blood, adoption or marriage, or not nore than two (2) unrelated persons living and working together as a single housekeeping unit."

23. The lots on which Defendant's house is situated are zoned for use for single-family dwelling only.

24. The Plaintiffs, because of the proximity of their homes to the property of the Defendant in Virginia Place, will suffer special damage from the present and intended use of Defendant's property not suffered by the community in general.

25. The house owned by defendant Shaver was, at the time of trial, a single-family dwelling structure.

Conclusions of Law

1. Considering the language of the Dedication Deed alone without the aid of extrinsic evidence, those provisions of the restrictive covenants set forth above in the Court's Findings of Fact restrict the Defendant's property to use for single-family residential purposes only.

2. The use being made by the Defendant of his property is not a single-family residential use and is in violation of the restrictive covenants applicable to his property.

3. The use being made by the Defendant of his property in said Virginia Place, through his tenant, is in violation of the City of Lubbock Comprehensive Zoning Ordinance, 1975, because the persons residing therein are not a "family" as defined in said Ordinance.

4. The Plaintiffs, as private individuals, do not have standing to maintain a suit to enjoin the violation by the Defendant of the City of Lubbock Comprehensive Zoning Ordinance, 1975.

RENDERED AND ENTERED this 19th day of December, 1980. [As amended on January 13, 1981].

/s/ William R. Shaver

Judge Presiding

Office - Supreme Court, U.
FILED
OCT 26 1982
ALEXANDER L. STEVAS
CLERK

NO. 82-503

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LELAND LESTER SHAVER,

Petitioner,

VS.

BOB L. HUNTER, ET AL.,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Seventh Supreme Judicial District of Texas

---

BRIEF IN OPPOSITION

CARR, EVANS, FOUTS & HUNT
P.O. Box 2585
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ATTORNEYS FOR RESPONDENTS
October 25, 1982

DONALD M. HUNT
SBN 10284000
Of The Firm

NO. 82-503

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OCTOBER TERM, 1982

LELAND LESTER SHAVER,

Petitioner,

VS.

BOB L. HUNTER, ET AL.,*

Respondents.

QUESTION PRESENTED

May a petitioner, seeking review by the Supreme Court of a state court's adjudication of a dedication deed's restrictive covenant, predicate the presence of a "case or controversy" on mere dictum in the opinion on an issue which the parties do not dispute and on which no controvery exists?

---

*The other party respondents are John Zakrasek, Osco Abney, D.D. Tibbets, and Myron Hart.

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NO. 82-503

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OCTOBER TERM, 1982

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Petitioner,

VS.

BOB L. HUNTER, ET AL.,

Respondents.

BRIEF IN OPPOSITION

TO THE SUPREME COURT OF THE UNITED STATES:

Respondents, BOB L. HUNTER and the other Homeowners, appellees in the Court of Appeals for the Seventh Supreme Judicial District of Texas (and plaintiffs below) respectfully submit this brief in opposition to the petition for writ of certiorari filed by petitioner, LELAND LESTER SHAVER (appellant-defendant below). For clarity, petitioner, the lessor of the property in issue, is called "the Landlord" and the respondents are called "the Homeowners".

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of U.S. CONST., art. III, §2, provide:

> The judicial power shall extend to all cases * * * arising under this Constitution * * *.

STATEMENT OF THE CASE

The Landlord correctly states the course of proceedings and the results in the trial and appellate courts.

The Landlord also correctly states the majority of the facts. As the Landlord accurately observed, he argued certain state common law principles in his attempt to invalidate the covenant. Using state law principles applicable to restrictive covenants, the Landlord urged that public policy, as expressed at the state and federal levels, in combination with the unreasonableness of the covenant, made it unenforceable. As the Landlord also correctly observed, the court of appeals to which certiorari is sought

raised the "issue" now challenged without the assistance of any party. No party, either then or now, urged the issue. Indeed, as the Landlord admitted (PETITION, p. 7), no one had standing to raise the issue!

The Landlord, however, failed to mention all of the evidence concerning the public policy. The policy, even as the Landlord enunciates it, is to encourage the development of living alternatives for handicapped people in the least restrictive situations and in as normal a setting as possible. In support of the policy, the Landlord presented evidence that handicapped persons do better in residential surroundings. However, witness after witness for the Landlord admitted that the same development could and does occur where handicapped persons reside in multi-family areas and in single-family areas without restrictions. Numerous viable alternatives exist for handicapped persons to achieve that same improvement in other subvidisions of Lubbock, Texas.

SUMMARY OF ARGUMENT

This court should deny certiorari, because no "case or controversy" is present. The Landlord attempts to complain of the sua sponte adjudication of an "issue" neither raised nor argued before the court of appeals. As such, the offending language, contained in a scant two or three sentences in a single paragraph, constitute nothing more than dictum. Therefore, because no party raised the issue and because no party now advocates the issue, no case or controversy exists to adjudicate.

ARGUMENT

THE SUPREME COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI, BECAUSE NO "CASE OR CONTROVERSY" BETWEEN THE LANDLORD-PETITIONER AND THE HOMEOWNER-RESPONDENTS CAN EXIST BASED ON DICTUM ON AN ISSUE WHICH THE PARTIES DO NOT DISPUTE AND ON WHICH NO CONTROVERSY EXISTS.

This court should summarily reject the petition for writ of certiorari, because no case or controversy exists. U.S.CONST.,

art. III, §2, requires that a "case or controversy" be present before the judicial power to review exists. In this instance, there is no controversy but only an attempt to use a scant few lines of dictum to seek review by this court. In such a context, no need exists for certiorari.

The necessity for existence of a "case or controversy" has long been settled. In re Summers, 425 U.S. 561 (1944); Preiser v. Newkirk, 422 U.S. 395 (1975); Babbitt v. United Farm Worker's Nat. Union, 442 U.S. 289 (1979). As described in Summers, 325 U.S. at 567, "[T]here must be an actual controversy over an issue, not a desire for an abstract declaration of law." Babbitt, 442 U.S. at 298, describes the requirement as "* * * substantial controversy * * * a definite dispute and concrete, not hypothetical or abstract."

The Landlord cannot meet these tests. As he admits in his petition, the court of

appeals raised the issue on its own. The Landlord only argued that state common law principles, combined with a public policy, made the covenant unenforceable. The Homeowners responded that public policy only required that the handicapped have the same rights and responsibilities as all citizens, a policy which could be accomplished without destruction of the covenants in issue. Thus, the court of appeals raised the issue sua sponte; as such, the offending language — only two or three sentences —constitutes nothing more than dictum which neither party either advocated then or now. Therefore, absent any real controversy, no case or controversy is presented for review.

A quick examination of the real controversy demonstrates the Landlord's problem. The Landlord relies on a public policy enunciated in federal and state statutes. These policy statements express the intent that handicapped persons should be in "home-living" situations where feasible. The goal of

the policy is to accord handicapped persons the least restrictive living alternatives in as normal a setting as possible. The policy thus promotes equal treatment. The command for equal treatment is best shown by TEX.REV. CIV.STAT.ANN. art. 5547-300, §2(c) (1977), where the legislature states that it seeks "to educate the general public to the fact that mentally retarded persons * * * have the same rights and responsibilities enjoyed by all citizens of Texas." The Homeowners have never quarreled with this public policy.

The Landlord's argument, however, is seriously flawed in two respects. First, the Landlord points to the existence of a policy as a premise on which to base his argument. Then the Landlord concludes that the restrictive covenant is unenforceable. The Landlord never bridges the gap between the premise and the conclusion with any authority. The mere existence of the policy does not require the conclusion. The second flaw represents

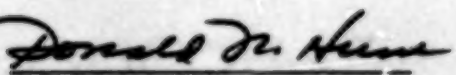
the reason why. Handicapped persons can receive benefits from deinstitutionalization and being placed in as normal a situation as possible in any home setting, whether in an apartment, a duplex or an unrestricted residential area. As thus stated, this is a controversy between the parties, not any federal constitutional issue.

Absent a real controversy, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons stated, the Supreme Court of the United States should deny the petition for writ of certiorari to the Court of Appeals for the Seventh Supreme Judicial District of Texas, and affirm the judgment of that court with costs taxed to the Landlord.

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CERTIFICATE OF PARTIES

This brief has been served on the Landlord-petitioner by mailing a copy to his attorney, Renea Hicks, ADVOCACY, INC., 5555 North Lamar Blvd., Suite K-109, Austin, Texas, 78751, on October 25, 1982.

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CLERK

No. 82-583

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LELAND LESTER SHAVER,
Petitioner,

V.

BOB L. HUNTER, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

PETITIONER'S REPLY MEMORANDUM ON CERTIORARI

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

LELAND LESTER SHAVER,

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BOB L. HUNTER, et al.,

Respondents.

PETITIONER'S REPLY MEMORANDUM ON CERTIORARI

Leland Lester Shaver, the petitioner herein, submits this memorandum in reply to the respondents' Brief in Opposition to the Petition for a Writ of Certiorari.

In their Brief in Opposition, the five neighboring property owners who are the respondents herein take the approach that the Questions Presented to this Court by Mr. Shaver are really not issues at all. They do this in two ways. First, nowhere in their Brief in Opposition do the neighbors discuss or even specifically mention the issues raised by Mr. Shaver, thereby implicitly treating them as non-issues. Second, in their few, vague references to Mr. Shaver's issues, the neighbors repeatedly concede that they do not oppose Mr. Shaver's position on those issues. *See, e.g.*, Brief in Opposition, at ii, iii, and 4 (parties "do not dispute" the issue on certiorari), *id.*, at 3, 4, and 6 (no party "now" urges the issue on certiorari).

The only conclusion that can be drawn is that the neighbors, trapped by the state appellate court's dubious resolution on federal

constitutional grounds of an issue that they had not even raised, have conceded the state appellate court's error on the federal issues presented to this Court.

To extricate themselves from the dilemma of conceding the lower court's legal error while preserving their victory, the neighbors argue that no Article III case or controversy now exists for this Court to adjudicate. Their basis for this argument is that no one is now arguing in support of the appellate court's holding concerning the federal constitutional issue and that, therefore, there is no case or controversy concerning that issue. Yet, the neighbors are compelled to acknowledge the obvious—that, whatever concessions they make on the federal constitutional issues, there remains a controversy between the parties. *See* Brief in Opposition, at 8("[T]his is a controversy between the parties . . .").

The neighbors' effort to use the Article III case or controversy jurisdictional requirement to avoid this Court's review of the concededly erroneous federal constitutional decision must be unavailing. The neighbors' concession of the state court's mistake does not remove the Article III underpinnings from this case. Despite its opportunity to do otherwise and despite the absence of an invitation for such an approach, the state appellate court, however cursorily, disposed of one of the independent grounds urged for reversal on federal constitutional grounds.*

Mr. Shaver now is subject to an adverse injunction concerning his use of the property in question, and his situation is attributable to the appellate court's disposition of the case, including its disposition on federal constitutional grounds. Therefore, the neighbors' argument that there now is no case or controversy is patently frivolous. The bankruptcy of the neighbors' case or controversy argument is manifest, because to accept it as a basis for refusing

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* Although the state appellate court could have chosen to rest its disposition of the third point of error before it on an adequate and independent state ground, thereby precluding this Court's review, it has not been—and cannot be—seriously contended that it did so. As explained at page 3 of the certiorari petition, the Amarillo court skipped over the state law question to decide the federal constitutional issue. The neighbors have conceded the accuracy of this characterization of the lower court's decisionmaking, *see* Brief in Opposition, at 2 (Mr. Shaver "correctly states" the course of proceedings and the results), and a review of the relevant part of the lower court's opinion, *see* Petition for Certiorari, at 7a, confirms its accuracy. Because the state court decision unambiguously rests on federal constitutional law, even though it could have rested on state law, this Court has jurisdiction to review it. *See Orr v. Orr*, 440 U.S. 268, 276-77 (1979).

review of the issues Mr. Shaver has presented the Court would hand all respondents to certiorari petitions a tactical way to preclude this Court's review of federal constitutional issues. Every respondent would need only to represent to the Court that it no longer contests the constitutional issue and, in that way, insure that the lower court's disposition of the constitutional issue remains impervious to review. The Court's Article III "case or controversy" jurisprudence does not require such an absurd result.

Especially after the neighbors' Brief in Opposition, the posture of this case is such that plenary view and summary disposition on the merits is warranted. The court below's judgment should be vacated, and the case remanded to that court for further consideration in light of the action taken by this Court. *Cf. Mayberry v. Pennsylvania*, 382 U.S. 286 (1965) (upon respondent's concessions, state court judgment vacated and case remanded for further consideration).

Respectfully submitted,

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November, 1982